WONG WENG FOO & CO v. LONDON BISCUITS BHD (IN LIQUIDATION)

COURT OF APPEAL, PUTRAJAYA
SUPANG LIAN JCA
AZIMAH OMAR JCA
AZHAHARI KAMAL RAMLI JCA
[CIVIL APPEAL NO: W-02(A)-1992-10-2022]
24 JULY 2024

Abstract – *Joint-liquidators must act jointly. It is not within the power of any one co-liquidator to unilaterally and disjointedly represent the will of the company in liquidation to file an application to remove the other co-liquidator. If co-liquidators are clothed with the capacity to unilaterally represent a company as a defiant sole liquidator to remove one another, the entire legal mechanism of having joint liquidators shall be doomed to fail as the nature of check and balance in and of itself deals with conflicts and opposing views.*

COMPANY LAW: *Liquidators – Joint-liquidators – Removal – Application by one co-liquidator/applicant to remove other co-liquidator – Whether applicant competent and had locus standi to make application – Residuary powers of Board of Directors to represent company – Whether post-winding up residuary powers of Board of Directors extend to cover liquidators – Whether applicant ought to be allowed to unilaterally act on behalf of company in liquidation without referring to co-liquidator – Companies Act 2016, s. 482(b)*

CIVIL PROCEDURE: *Stay – Application for – Application by one liquidator/applicant to stay order of Court of Appeal to allow applicant to continue with leave applications at Federal Court and any subsequent appeal – Application made without reference to co-liquidator – Whether application seeking preservation and non-preservation of status quo – Whether applicant approbated and reprobated stances – Whether application attempt to sidestep order of Court of Appeal – Whether stay ought to be granted – Courts of Judicature Act 1964, s. 44*

The appellant was a former auditor of London Biscuits Bhd ('LBB'). When LBB was wound up, one Lim San Peen ('LSP') was appointed as the liquidator of LBB. LSP had filed a post-winding up application at the High Court for, *inter alia*, (i) the appointment of one Victor Saw ('Victor') as the liquidator of LBB; and (ii) the discharge and release of LSP as the liquidator of LBB ('transition application'). The appellant intervened in the transition application and objected to the same. The appellant then commenced an application, at the High Court, that, *inter alia*, leave be granted to: (i) commence proceedings against LSP for certain contended breaches of his duties as the liquidator of the respondent; (ii) declare that LSP was in breach

of his duties in respect of certain contentions; (iii) remove LSP; (iv) prohibit the appointment of Victor as the new liquidator of LBB; and (v) nominate one Gabriel Teo ('Gabriel') as the liquidator of LBB ('HC Application 282'). The High Court allowed the transition application and dismissed the HC Application 282. Dissatisfied, the appellant appealed to the Court of Appeal. The appeal against the HC Application 282 was allowed while the appeal against the transition application was allowed in part ('COA order'). The appellant and Victor filed their respective motions for leave to appeal to the Federal Court in relation to the COA order. Victor, through encl. 48, sought an interim order, pursuant to s. 44 of the Courts of Judicature Act 1964, to stay the COA order in order to continue with the leave applications at the Federal Court and any subsequent appeal, without reference to the other liquidator, Gabriel. The appellant raised a preliminary objection, arguing that Victor was incompetent and lacked *locus standi*. The issues that arose for adjudication were: (i) whether there was any merit in the appellant's preliminary objection; (ii) whether Victor could legitimately ask the court to extend the post-winding up residuary powers of the Board of Directors to cover even liquidators, so as to allow himself to unilaterally act on behalf of LBB without referring to the co-liquidator, Gabriel; and (iii) whether the court should grant a stay as against the COA order in the specific manner prayed by Victor.

Held (dismissing encl. 48)
Per Azimah Omar JCA delivering the judgment of the court:

(1) *Shencourt Sdn Bhd* ('*Shencourt*') held that joint liquidators must act jointly. The rationale behind *Shencourt* was that joint liquidators' respective applications were improper as no one joint liquidator could unilaterally and disjointedly carry the will and interest of the company in liquidation. Therefore, there was indeed merit in the appellant's preliminary objection against Victor's *locus standi*, as unilateral co-liquidator, to represent LBB and as against the competency of Victor's encl. 48. (paras 44, 47 & 48)

(2) The general rule is that the moment a company is under liquidation, the Board of Directors no longer have any control over the company and relinquishes the same control over to the liquidators who, in turn, shall manage the affairs of the company in pursuit of liquidating the company's assets for onwards distribution to the company's creditors. Nonetheless, the court has, as trite law, upheld that despite the liquidation or appointment of a provisional liquidator, the Board of Directors shall retain an extent of residuary powers to represent the company to challenge the court's winding-up order. Victor was adamant in painting this portrait of a 'deadlock' in that LBB could not move forward if Victor could not be allowed to move independent off of the other liquidator, Gabriel. It was on this so-called deadlock that Victor

saw it appropriate to 'represent' LBB as sole liquidator to file the motion for leave to appeal to the Federal Court as well as encl. 48. However, the truth of the matter was that the deadlock could be undone without Victor's overreaching of power. If indeed there was any misconduct by one co-liquidator, which was not a question before the court at this time, then the Board of Directors of LBB would hold the necessary residuary powers to file the same leave application to appeal and the same motion to stay the COA order, not any one singular co-liquidator. In the present application, there were no averments or depositions indicative of the Board of Directors' reluctance or refusal to act. In the absence of such deposition, the only logical inference was that Victor had not, or had never, intended to seek any confirmation or authorisation of the Board of Directors for them to act on their residuary powers. Victor simply assumed that the same residuary power ought to be extended to liquidators, to which the law never provided for such extension of residuary power to liquidators. Alternatively, if the deadlock was as grievous as Victor would paint it, then any of LBB's creditors, inclusive of the appellant, can apply to remove both co-liquidators under s. 482(b) of the Companies Act 2016 for the failure to functionally act in the best interest of LBB's liquidation. The initial decision by the High Court, in HC Application 282, would not bar the filing of such application as HC Application 282 was an application to remove LSP, and not any of the co-liquidators. Considering the available procedures above, it was glaring that Victor was merely trying to go for a 'shortcut' to enable himself to act as sole liquidator and quickly wrap up the liquidation process by his own unilateral design even before the Federal Court had the opportunity to hear the parties' respective leave applications. (paras 50, 57-60 & 62)

(3) Victor vacillated in his written submission in contradictorily asking for both preservation and non-preservation of *status quo* where within: (i) the initial portions of his submission for stay, he argued that the *status quo* of his appointment by the High Court as sole liquidator should be preserved as it was the wishes of LBB's creditors to favour only his appointment; but (ii) the later portions of his submission for stay, he posited that Gabriel's appointment under the COA order would hinder the supposed last leg of LBB's liquidation process. In one breath, Victor staunchly championed the idea of a stay to preserve the *status quo* but, in the same breath, he also championed the idea for the liquidation to proceed, which would effectively squander the *status quo*. The court did not appreciate Victor's approbating and reprobating of stances in his attempt to sidestep the COA order, and even all of the pending proceedings at the Federal Court, to seize an opportunity to swiftly unilaterally and disjointedly proceed with LBB's liquidation, in total

A disregard of Gabriel and the interest of the appellant. There was no reason to grant a stay of the COA order in terms as prayed for by Victor. (paras 67-69)

Case(s) referred to:

Equiticorp Holdings Ltd v. United Securities Sdn Bhd [2007] 6 CLJ 268 CA ***(refd)***

B *Harvey v. Burfield (Liquidator Of Normans Wines) [2002] SASC 314* ***(refd)***

Re Diamond Fuel Company [1879] 13 Ch D 400 ***(refd)***

Re Laverton Nickel NL [1979] 3 ACLR 945 ***(refd)***

Re Mawcon Ltd [1969] 1 All ER 188 ***(refd)***

Re Metropolitan Bank v. Jones [1976] 2 Ch D 366 ***(refd)***

Re Union Accident Insurance Co Ltd [1972] 1 All ER 1105 ***(refd)***

C *Shencourt Sdn Bhd v. Shencourt Properties Sdn Bhd [2019] 3 CLJ 791 CA* ***(refd)***

Sri Hartamas Dvpt Sdn Bhd v. MBf Finance Bhd [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436 SC ***(refd)***

Taman Sungai Dua Development Sdn Bhd v. Goh Boon Kim [1997] 2 CLJ 315 CA ***(refd)***

Legislation referred to:

D Companies Act 2016, s. 482(b)

Courts of Judicature Act 1964, s. 44

For the appellants - Steven Tan Chee Qian, Tan Chee Yi, Chuah Chern Tee & Low Han Shin; M/s Chuah Qian & Partners

For the respondent - Lim Chee Wee, Kwan Will Sen & Pang Huey Lynn; M/s Lim Chee Wee Partnership

E *For the aggrieved party - Rabindra S Nathan, Priyanka Menon & Siti Nursyafiqah; M/s Shearn Delamore*

For the joint liquidators - S Raven & Jenice Tay Shu Hui; M/s S Ravenesan Teh Tse Yee & Vivian Lim; M/s TY Teh & Partners

F *Reported by Najib Tamby*

JUDGMENT

Azimah Omar JCA:

Introduction

G **[1]** This decision is in respect of one of the respondent's liquidator's notice of motion ("encl. 48") dated 8 December 2023. In encl. 48, the respondent's liquidator prayed, *inter alia*, that:

> 1) Bahawa Encik Victor Saw Seng Kee, menurut Seksyen 69(4) Akta Mahkamah Kehakiman 1964, dibenarkan untuk memfailkan dan
H memberi arahan berhubung dengan permohonan ini dan permohonan dalam Notis Usul Mahkamah Persekutuan No. 08(f)-381-11/2023(W) untuk kebenaran merayu kepada Mahkamah Persekutuan berhubung dengan Perintah Mahkamah Rayuan bertarikh 30.10.2023 ("Perintah Mahkamah Rayuan"), dan apa-apa

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rayuan kepada Mahkamah Persekutuan, tanpa memerlukan kelulusan dan/atau persetujuan pelikuidasi bersesama, Encik Gabriel Teo Chun, yang dilantik oleh Perintah Mahkamah Rayuan tersebut;

2) Bahawa Perintah Mahkamah Rayuan yang diberikan pada 30.10.2023 ditangguh sementara menunggu pendengaran dan penentuan penuh dan muktamad Notis Usul Mahkamah Persekutuan No. 08(f)-381-11/2023(W) bagi kebenaran merayu kepada Mahkamah Persekutuan, dan jika kebenaran itu diberikan, apa-apa rayuan kepada Mahkamah Persekutuan;

3) Kos mengikut kausa rayuan; dan

4) Apa-apa relif lanjutan atau lain yang dianggap sesuai oleh Mahkamah Yang Mulia ini.

[2] The English translation of prayers in encl. 48 reads as follows:

1) That Mr Victor Saw Seng Kee, pursuant to Section 69(4) of the Courts of Judicature Act 1964, be allowed to file and give instructions in relation to this application and the application in the Federal Court Notice of Motion No. 08(f) -381-11/2023(W) for leave to appeal to the Federal Court in relation to the Court of Appeal's Order dated 30.10.2023 ("COA Order"), and in any appeal to the Federal Court, without requiring the approval and/or consent of the joint liquidator, Mr. Gabriel Teo Chun, appointed by the COA Order itself;

2) That the COA Order granted on 30.10.2023 be stayed pending the hearing and full and final determination of the Federal Court Notice of Motion No. 08(f)-381-11/2023(W) for leave to appeal to the Federal Court, and if such leave is granted, any appeal to the Federal Court;

3) Costs be in the cause of the appeal; and

4) Such further or other relief as deemed appropriate by this Honourable Court.

[3] Enclosure 48 was filed by the respondent's liquidator supposedly as a matter of 'honest prudence' so that one of the two co-liquidators can 'solidify' the legitimacy and competency of its unilateral actions and motion to appeal to the Federal Court. But it appears to us that the intentions of the respondent's liquidator in filing encl. 48 are to:

(i) unlawfully and unilaterally invoke the Board of Directors' post-winding up residuary power (as sole liquidator) on behalf of the respondent-company; and

(ii) unlawfully and unilaterally act as a sole liquidator (without the consent and mutual agreement of the other court-appointed joint co-liquidator).

[4] The respondent (or more accurately the liquidator – Victor) knew of (and had full knowledge of) the legal impediment to his actions. Thus, the liquidator pre-emptively filed encl. 48 in an attempt to stretch and skew the law so as to legitimise the liquidator's actions (which in reality were in breach of order of the Court of Appeal and prevailing laws governing a company's residuary powers post-winding up).

[5] The respondent (liquidator) also applied for a stay of a Court of Appeal decision ordering the liquidation process of respondent-company ("London Biscuits Berhad") to proceed with the appointment of a joint liquidator. On one hand, the liquidator insisted on 'preserving the *status quo*'. But on the other hand, the liquidator also insisted on not preserving the *status quo* and having the liquidation to proceed in the liquidator's 'preferred' configuration of a sole liquidator (and not a joint liquidator). The liquidator's prayers and contentions, in our view, are confusing and self-contradictory.

[6] Before proceeding any further, it is appropriate to first set out the facts of this appeal.

Facts Of The Case

[7] The appellant ("Wong Weng Foo & Co") was a former auditor of a previously listed company, London Biscuits Berhad ("LBB"). The LBB was wound-up on 13 January 2020. One, Lim San Peen ("LSP"), was appointed as the liquidator of LBB.

[8] On 6 May 2021, LSP filed a Post Winding Up Application No: WA-28PW-139-05-2021 ("transition application") at the High Court *inter alia*, for:

(i) Victor Saw Seng Kee ("Victor") to be appointed as the liquidator of LBB;

(ii) LSP be discharged and released as the liquidator of LBB.

[9] On 1 August 2021, the appellant intervened in the transition application and objected to it.

[10] On 6 October 2021, the appellant commenced an application in the High Court, Post Winding Up Application No: WA-28PW-282-10-2021 ("HC Application 282"), that amongst others, leave be granted to:

(i) commence proceedings against LSP for certain contended breaches of his duties as the liquidator of the respondent;

(ii) declaration that LSP was in breach of his duties in respect of certain specific contentions (claim for declaratory relief was discontinued at the later appeal stage in the Court of Appeal);

(iii) remove LSP;

(iv) prohibit the appointment of Victor as the new liquidator of LBB; and

(v) nominate Gabriel Teo Chun ("Gabriel") as the liquidator of LBB.

[11] On 3 October 2022, the High Court allowed the transition application and dismissed HC Application 282.

[12] Dissatisfied, the appellant filed two notices of appeal to the Court of Appeal:

(i) W-02(A)-1992-10-2022 ("Appeal 1992") – this appeal; and

(ii) W-02(A)-1991-10-2022 ("Appeal 1991").

[13] On 3 July 2023, both the appeals were heard together before YA Datuk Hajjah Azizah binti Haji Nawawi JCA, YA Dato' Gunalan a/l Muniandy JCA and YA Dato' Azizul Azmi bin Adnan JCA.

[14] On 30 October 2023, this Honourable Court allowed the appeal against HC Application 282. The Honourable Court also allowed the appeal against the transition application in part ("COA order"). The grounds of judgment of the Court of Appeal is in encl. 41.

(Excerpts from the Grounds of Judgment (Enclosure 41))

a) We allow in part the appeal against the decision of the High Court in the Discharge Application (HC Application 139) and in this connection:

i. We hereby direct that Mr Lim San Peen not be discharged and released as liquidator of the Company;

ii. But we affirm the appointment of Mr Victor Saw as a liquidator of the Company; and

b) We allow in part the appeal against the decision of the High Court in the Leave Application (HC Application 282) and we hereby:

i. Grant leave to the Appellant to commence proceedings against Mr Lim San Peen;

ii. Direct the removal Mr Lim San Peen as the liquidator of the Company; and

iii. Appoint Mr Gabriel Teo as a joint liquidator of the Company together with Mr Victor Saw.

c) We determine the costs of the appeals to be RM20,000.00 payable by the Respondent to the Appellant. Such costs are to be subject to an allocator.

(emphasis added)

[15] On 30 November 2023, both the appellant and Victor (supposedly representing LBB) filed their respective motions for leave to appeal to the Federal Court in relation to the COA order dated 30 October 2023.

[16] We must make it clear that all references to the 'respondent' in this judgment, must necessarily only refer to one of the two LBB's joint-liquidators, Victor. The core fact underlying encl. 48 is that Victor is seeking to represent LBB as a sole liquidator (without the consent or authorisation of the other co-liquidator, Gabriel).

[17] This 'solo act' was the impediment that Victor is now seeking to legitimise *via* encl. 48. Since this impediment can impede on Victor's self-insisted right to represent LBB as a self-insisted sole liquidator, it is only appropriate that we do not simply assume the 'respondent' to be LBB from the outset.

Victor's Notice Of Motion – Enclosure 48

[18] Victor, through encl. 48, amongst others, seeks an interim order under s. 44 of the Courts of Judicature Act ("CJA 1964") to stay the COA order dated 30 October 2023.

[19] The orders sought are to allow Victor to continue with the leave applications at the Federal Court and any subsequent appeal without reference to the other liquidator (joint liquidator) appointed, Gabriel.

[20] Victor submits that Gabriel is conflicted from taking any position in these matters as the leave applications directly concern his appointment.

[21] Victor further contends that the application for consequential orders through encl. 48 was intended to preserve Victor's statutory right to appeal. Victor further submits that it is well within the jurisdiction of this court to grant consequential orders to give effect to the final judgment or order of this court (specifically the COA order dated 30 October 2023). In other words, the rule of *functus officio* does not apply.

[22] Despite the appointment of Gabriel as the joint liquidator (COA order dated 30 October 2023), *via* this encl. 48, Victor is now seeking an order from this court that he can solely give instruction and make decisions (on behalf of LBB) in relation to the leave application to the Federal Court and this stay application (encl. 48), particularly even if this stay application is not allowed.

[23] Victor insisted that as a liquidator, he should be extended the same residual powers (post-liquidation) of a company's Board of Directors to act on behalf of LBB to appeal against the COA order.

[24] Victor further submits that this court possesses the powers to grant the prayers sought in encl. 48 pursuant to s. 44 of the CJA 1964.

[25] Victor's arguments to support this motion can be summarised as follows:

(i) first, Victor contends that the stay order sought is necessary to prevent prejudice to the Victor's claim pending the hearing of the leave applications and/or any subsequent appeals to the Federal Court. It is necessary to preserve the *status quo* of LBB pending the final disposal of all appeal proceedings.

(ii) second, the majority of creditors of LBB support Victor's appointment as the sole liquidator in place of LPS, hence, it is fundamental to preserve the majority decision. According to Victor, the liquidation is at final stages and the appointment of joint liquidator may delay the completion of the liquidation process. Victor also contends that there is no exceptional gravity in the circumstances to warrant the appointment of the joint liquidator, and such appointment may, in practical terms, not be conducive to the smooth administration of LBB.

(iii) third, it is necessary to preserve the *status quo* until the leave application and/or subsequent appeals to the Federal Court, if there are any, to be disposed of. Victor submits that, should LBB's liquidation be forced to proceed to completion with the appointment of a joint liquidator, prior to the disposal of the leave application and the subsequent appeal if leave is granted, before the Federal Court, even if the Federal Court allows the appeal, the decision would be rendered academic and nugatory. If the appeal is allowed, the appointment of Gabriel as a joint liquidator would also be reversed, which would put the decisions made in the interim in relation to the liquidation of LBB in an unclear situation.

The Appellant's Challenge Against Enclosure 48

[26] The appellant raised a preliminary objection ("PO") against the affidavit in support of encl. 48 affirmed by Victor to be incompetent and lacking in *locus standi*. The appellant contends that Victor's conduct clearly tantamount to contempt of court as he is and was clearly aware of the COA order dated 23 October 2023 appointing Gabriel to act together with him as the joint liquidators of the respondent. The appellant submits that the affidavit in support solely affirmed by Victor was untenable and incompetent due to the legal position that when there are two liquidators appointed jointly, both of them must affirm an affidavit jointly (or on behalf of each other).

[27] The appellant submits that Victor does not retain any residuary power to file leave application to the Federal Court as well as this motion in encl. 48. The appellant argues that, limited residuary power (to appeal against the winding-up order or to oppose the winding-up petition on behalf of the company) only exists in the hands of the Board of Directors when a company is ordered to be wound up nor a provisional liquidator is appointed prior to the winding up. Victor, as court-appointed joint-liquidator of the LBB does not unilaterally or independently retain any such residuary power.

[28] The appellant strongly contends that in the event this court allows prayer 1 of encl. 48, it will contravene the trite principle that joint-liquidators (upon their appointment) must jointly act together or *in tandem* with each other. The appellant also averred that Victor's unilateral conduct clearly demonstrated that he was biased in favour of the impugned former liquidator (LSP), who was no longer involved in the liquidation of LBB.

[29] In opposing Victor's prayer for a stay order, the appellant submits that Victor failed to demonstrate how the COA order had prejudiced him or how the appointment of Gabriel had caused disruption to the liquidation process of LBB. The appellant further contends that Victor had hindered Gabriel from carrying out his duties and powers as one of the joint liquidators, when in the first place, the COA's appointment of joint liquidators was intended to fairly safeguard the interests of all creditors of LBB.

[30] Apart from the above, the appellant states that the wishes of the creditors cannot in any manner be deemed as a determinant for this motion in encl. 48 as LBB was wound-up by the order of the court and not under a creditor's voluntary winding-up.

[31] Furthermore, the appellant submits that Victor's contention in support of its motion constitutes merits of the leave application to the Federal Court, which would be irrelevant at this stage for this court to consider.

[32] The appellant also highlighted that LBB had been in liquidation approximately four years ago since 13 January 2020 and thus, a stay of execution of the COA order will only further prejudice and delay the liquidation process of LBB. An undue delay which the appellant argued to be not in the interest of all creditors of LBB.

First Hearing Of Enclosure 48 On 28 May 2024

[33] Enclosure 48 was first fixed for hearing on 28 May 2024 together with six other notices of motion which all were heard and disposed of on the same day (save for encl. 48). Parties prayed before this panel to reserve the decision pending global settlement among them. The panel then had already agreed with the appellant's argument on the limitations as to the residuary powers of a Board of Directors but (out of respect to the parties' wishes) still proceeded to reserve its decision. (See CMS Minutes on 28 May 2024):

> Mr Lim Chee Wee: MLF and I have had a conversation. We think we are quite close to an agreement and ask for 2 weeks to come up with a consent order to be recorded in the Federal Court. We pray for decision to be reserved pending global settlement by the parties.

Mr Steven Tan: I confirm.

Court: Decision (NU2-Encl 48) We agree with counsel for the appellant (Wong Weng Foo) that residuary power lies with the Board of Directors of a company which is ordered to be wound up. However, in view that parties have expressed a desire to come up with a global settlement and ask for time to do so, we will reserve judgment to a date to be fixed in 2 weeks' time. Parties are to go for e-review to fix the date for global settlement. To 19.6.2024 for ereview to update the court on settlement.

[34] During the case management (*vide* E-Review) on 19 June 2024 and 1 July 2024, parties informed the Deputy Registrar that they are still attempting negotiations, meanwhile, parties requested for a decision date to be fixed pertaining to encl. 48. As such, encl. 48 was this fixed for decision today on 24 July 2024.

The Motion Before Us

[35] We have analysed and perused through all of the affidavits filed herein under encl. 48, and the parties' respective written submissions and are of the opinion that the propriety of encl. 48 before us can be determined by addressing all of the issues as follows:

(i) issue 1: Whether there was any merit in the appellant's preliminary objection against Victor's *locus standi* (as unilateral co-liquidator) to represent LBB, and as against the competency of Victor's encl. 48;

(ii) issue 2: Whether Victor can legitimately ask this court to extend the post-winding up residuary powers of the Board of Directors to cover even liquidators (so as to allow Victor to unilaterally act on behalf of LBB without referring to the co-liquidator, Gabriel); and

(iii) issue 3: Whether this court should grant a stay as against the COA order in the specific manner prayed by Victor.

Issue 1: Whether There Was Any Merit In The Appellant's Preliminary Objection Against Victor's *Locus Standi* (As Unilateral Co-liquidator) To Represent LBB, And As Against The Competency Of Victor's Enclosure 48; determined together with

Issue 2: Whether Victor Can Legitimately Ask This Court To Extend The Post-winding Up Residuary Powers Of The Board Of Directors To Cover Even Liquidators (So As To Allow Victor To Unilaterally Act On Behalf Of LBB Without Referring To The Co-liquidator, Gabriel)

[36] Issues 1 and 2 are actually interrelated issues as Victor was attempting to yield a favourable finding in issue 2 (extension of post-winding up residuary powers) so that Victor can wield that favourable finding as an answer to remedy or dispel the inevitable impediment (and incompetency) which the appellant had raised in issue 1.

[37] Succinctly, the appellant raised an apt question as against Victor's defiant actions and insistence to unilaterally move (and represent) LBB as a 'sole liquidator' without any involvement or even reference to his joint-liquidator, Gabriel. The appellant discerningly highlighted that all of the affidavits filed in support of LBB's (more accurately Victor's) encl. 48 (as well as leave application to appeal to the Federal Court) were unilaterally affirmed by Victor without any authorisation or even reference to Gabriel (as co-liquidator) or to LBB's Board of Directors.

[38] Victor had done the above despite full knowledge of the COA's order and appointment of Gabriel as co-liquidator so as to ensure a fair and just procession of liquidation of LBB (to the best interest of all creditors inclusive of the appellant).

[39] We are aware that the merits as to the COA order are not before us (and shall be determined before the Federal Court during the leave hearing) but we are still minded that the COA order appointing Gabriel as joint liquidator was intended to fairly draw a compromise between LBB's interest to complete the liquidation process and the appellant's interest to safeguard its position within the roster of LBB's creditors (in view of a proper and fair liquidation and distribution of proceeds from LBB's liquidation).

[40] The aforementioned considered, we agree with the appellant's contention that the COA's appointment of jointliquidators necessarily should impose upon LBB (and both co-liquidators) to move and proceed as a united front. Thus, the law would necessarily dictate that neither one of the co-liquidators are ought to be allowed to embark on his own 'solo act' to unilaterally represent the interest of LBB.

[41] The appellant had discerningly referred to the Australian Supreme Court case of *Harvey v. Burfield (Liquidator Of Normans Wines* [2002] SASC 314, BC200205509:

> [55] If it is accepted that where more than one liquidator is appointed the liquidators should be regarded *as joint liquidators, with the consequence that they must act jointly and not severally in the exercise of any powers which may be conferred upon them,* the reason why s. 506(4) deals only with the situation where "several liquidators" are appointed becomes clear. Absent any determination to the contrary made at the time of their appointment, *where three or more liquidators are appointed, any power given by the Act may be exercised by any number not less than two.* (emphasis added)

[42] The respondent further highlighted (and we similarly agree) that the rule still rang true even if in case one of the co-liquidators passed away. Even with the passing of one of the co-liquidators, the surviving liquidators cannot automatically and simply assume that he can now assume the position of a sole liquidator (see *Re Metropolitan Bank v. Jones* [1976] 2 Ch D 366):

> It is said that it is a mere ministerial act to convey the legal estate which remains vested in the old company; and so it is on the part of any one who has authority to use the seal of the company; *but the question I have to consider is, whether any one has authority to use the seal.* Now it is plain that the company has no power to affix the seal; and s. 133, subs. 6, of the Companies Act provides that where more liquidators than one are appointed two at least must act in the absence of any direction to the contrary. Here there is no such direction, and *I am therefore of opinion that one liquidator cannot use the seal, and, consequently, that no person is at present authorized to use it. In order to execute a conveyance, a new liquidator must be appointed;* and s. 140 of the Act affords a means for doing this.
>
> (emphasis added)

[43] The rule in *Re Metropolitan* (*supra*) is certainly instructive in the case before us. The enforceability of the court's order to appoint multiple liquidators does not depend (and shall survive) on the death of one or even more co-liquidators. As long as that court order stands, then it can only be inferred that there were valid reasons to appoint more than one liquidator. This reason (as in this case, to fairly safeguard the appellant's interest) shall not be extinguished even if either Victor or Gabriel passes (even more so considering both of them are still alive). Clearly then, that Victor cannot sidestep Gabriel at his whims just because Victor disagrees with the COA order. This is especially so considering the fact that neither did LBB's Board of Directors had moved to exercise their residuary powers to appeal against the COA order or to file encl. 48 before us.

[44] In fact, closer to home, the Court of Appeal in *Shencourt Sdn Bhd v. Shencourt Properties Sdn Bhd* [2019] 3 CLJ 791; [2019] 12 MLJ 184 similarly held that joint liquidators must act jointly:

> [7] **In addition, it is well settled that joint liquidators must act jointly.** This was not the case here (see *Dina Nath v. BL Sharma and Ors* [1979] 49 Comp Cas 364 (Delhi)). In this time and era, the court must ensure that a liquidation of the company should be undertaken by committed liquidator. Delay in liquidation is a serious issue which cannot be brushed off by the courts at all stages. (emphasis added)

[45] In *Shencourt* (*supra*), the Court of Appeal dealt with a creditor's application under s. 482(b) of the Companies Act 2016 to remove joint liquidators who were unable to cooperate in the best interest of a company's liquidation process. In *Shencourt* (*supra)*, the Court of Appeal even considered the fact that even the co-liquidators filed their respective applications to remove one another from being co-liquidators. The Court of Appeal concluded that the joint liquidators must act jointly, and (instead of allowing the joint liquidators' applications to remove one another) had allowed the creditor's application to remove both the joint liquidators:

A [10] … After the appointment of both liquidators, there was no progress to the liquidation stage of the respondent. **Both liquidators were inconsistent and had put the assets of the respondent at risk.** There was personal conflict between the liquidators that caused the liquidation process to be stalled. The creditors lost confidence in both liquidators in dealing with the assets. Both liquidators could not co-operate with each
B other and they even filed a separate defence to the suit. **Both liquidators then filed applications to remove each other as joint liquidator.**

(emphasis added)

[46] The Court of Appeal in *Shencourt* (*supra*) proceeded to reverse the decision of the High Court and effectively allowed the creditor's application
C to remove the joint liquidators and not the joint liquidator's applications to remove each other:

… **The appellant was one of the creditors that made an application to remove Ricky and Jasani** as the liquidators and to re-appoint official receiver as the liquidator …

D …

[22] For reasons stated above, **we allow the appeal for removal of the liquidators, with no order as to costs** … (emphasis added)

[47] We can surmise that the rationale behind the Court of Appeal's
E decision in *Shencourt* (*supra*) was that the joint liquidators' respective applications were improper as no one joint-liquidator can unilaterally and disjointedly carry the will and interest of the company (in liquidation).

[48] All of the aforementioned deliberation considered, we hereby answer issue 1 in the negative. There was indeed merit in the appellant's preliminary
F objection against Victor's *locus standi* (as unilateral co-liquidator) to represent LBB, and as against the competency of Victor's encl. 48.

[49] As mentioned earlier, issue 2 was essentially Victor's attempt to pre-emptively remedy the legal impediment that was raised *via* the appellant's preliminary objection as against Victor's *locus standi* to
G unilaterally and disjointedly represent and move the interest of LBB without any authorisation or reference to the co-liquidator, Gabriel. And the manner of pre-emptive 'remedy' Victor was attempting to prove was that this court should extend and afford the Board of Directors' post-winding up residuary powers to cover liquidators.

H **[50]** For the sake of understanding, the general rule is that the moment a company is under liquidation, the Board of Directors no longer have any control over the company and relinquishes the same control over to the liquidators (who in turn shall manage the affairs of the company in pursuit of liquidating the company's assets for onwards distribution to the company's
I creditors). Nonetheless, the court has as trite law upheld that despite

liquidation (or appointment of provisional liquidator), the Board of Directors shall retain an extent of residuary powers to represent the company to challenge the court's winding up order.

[51] However, it was strikingly perplexing that all of the precedents that Victor proffered had:

(i) held that the residuary powers to challenge the winding up order are held and exercisable only by the Board of Directors; and

(ii) and never held that the same residuary powers ought to be clothed upon a liquidator.

[52] In his attempt to obtain a stay order from the execution of the COA order dated 23 October 2023 Victor had heavily relied upon the Supreme Court decision in *Sri Hartamas Dvpt Sdn Bhd v. MBf Finance Bhd* [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436; [1991] 3 MLJ 325. In *Sri Hartamas* (*supra*), an appeal against a winding up order was filed by the company's solicitors. The Supreme Court had in clear terms held that the only party who was vested with residuary powers (post-winding up) was the Board of Directors. The Supreme Court dismissed the appellant's motion to appeal as the only party that can exercise the residuary party was the Board of Directors:

> In *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105, it was held, *inter alia*, that notwithstanding the appointment of the provisional liquidator and the general assumption by him of the company's powers, **the board still retained certain residuary powers** which included authority to instruct solicitors and counsel to oppose the petition and, if a winding-up order is made, to appeal against the order.
>
> … After a winding-up order is made, generally speaking no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say that the winding-up order is wrong and to appeal against the order. In our case it is expressly provided in s. 253(2) of the Act. **The only question is who should move the appeal on behalf of the company.**
>
> An earlier decision of this court in *Rajannan s/o Ravaniah & Ors v. Sivalingam s/o Arumugam Karuppiah* (Civil Appeal No 02-41-1990) (unreported) is to be distinguished. **There the notice of motion for stay and the supporting affidavits were filed by the directors and shareholders** of Tamil Osai Sdn Bhd, the company, and they together with the company filed a motion for stay of the windingup order pending appeal. **The application for stay was allowed by this court** … (emphasis added)

[53] We have taken great pains to peruse through the authorities furnished by Victor (*Taman Sungai Dua Development Sdn Bhd v. Goh Boon Kim* [1997] 2 CLJ 315; [1997] 2 MLJ 526; *Re Laverton Nickel NL* [1979] 3 ACLR 945; *Re Mawcon Ltd* [1969] 1 All ER 188; *Equiticorp Holdings Ltd v. United Securities Sdn Bhd* [2007] 6 CLJ 268; *Re Union Accident Insurance Co Ltd*

A [1972] 1 All ER 1105; *Re Diamond Fuel Company* [1879] 13 Ch D 400) and we can clearly see that absolutely none of these precedents bear any support to Victor's case for the following reasons:

(i) a resounding majority of these precedents dealt with the Board of Directors' residuary powers to oppose or stay a winding up order and
B not an application to remove a liquidator (what more a unilateral application by a co-liquidator to remove another co-liquidator); and

(ii) all of the precedents vested the Board of Directors with the residuary powers and never any liquidator.

C **[54]** Victor's desperate reliance on the precedents above only succeeds if this court simply ignores the fallacy that LBB (in the leave application and this encl. 48) can be represented unilaterally and disjointedly by Victor as a defiant co-liquidator.

[55] The flaw in Victor's narrative was that he posited that he can first
D prove residuary powers (second issue) to remedy the impediment of having to jointly act with Gabriel (first issue). When, in fact, the true legal position was the inverse of Victor's supposition. In that Victor was supposed to refer to, and obtain cooperation of Gabriel to jointly act as co-liquidators (first issue) and only then proceed to represent LBB *via* the co-liquidators' own
E powers and authority (not even requiring to resort to the Board of Directors' residuary powers).

[56] However, Victor desperately tried to unlawfully move independent of Gabriel as Victor knew well that:

F (i) his attempts to remove Gabriel (the other co-liquidator) would be in defiance of the COA order; and

(ii) Gabriel unlikely would play along with Victor's schemes as Victor's intention would directly jeopardise Gabriel's position and appointment as co-liquidator.

G **[57]** Victor was adamant in painting this portrait of a 'deadlock' in that LBB cannot move forward if Victor cannot be allowed to move independent off of the other co-liquidator, Gabriel. And it is on this so-called 'deadlock' that Victor saw it appropriate to 'represent' LBB as sole liquidator to file the motion for leave to appeal to the Federal Court as well as encl. 48 before
H us.

[58] But the truth of the matter was that the deadlock can be undone without Victor's overreaching of power. If indeed there was any misconduct by one co-liquidator (which is not a question before us at this time), then the Board of Directors of LBB would hold the necessary residuary powers to file
I the same leave application to appeal, and the same motion to stay the COA order (not any one singular co-liquidator).

[59] Especially in the application before us, there were no averments or depositions indicative of the Board of Directors' reluctance or refusal to act. In the absence of such deposition, the only logical inference was that Victor had not or had never intended to seek any confirmation or authorisation of the Board of Directors for them to act on their residuary powers. Victor simply assumed that the same residuary power ought to be extended to liquidators (to which the law never provided for such extension of residuary power to liquidators).

[60] Alternatively, if the deadlock was as grievous as Victor would paint it, then (following the salutary wisdom of the Court of Appeal in *Shencourt Sdn Bhd v. Shencourt Properties Sdn Bhd* [2019] 3 CLJ 791; [2019] 12 MLJ 184) any of LBB's creditors (inclusive of the appellant here) can apply to remove both of the co-liquidators under s. 482(b) of the Companies Act 2016 for failure to functionally act in the best interest of LBB's liquidation. The initial decision by the High Court in HC Application 282 would not bar the filing of such application as HC Application 282 was an application to remove LSP (and not any of the co-liquidators).

[61] In any case, it is irrefutable that it was not within the power of any one co-liquidator to unilaterally and disjointedly represent the will of the company in liquidation to file an application to remove the other co-liquidator. It must be strictly kept in mind that even LBB did not file a leave application to appeal to the Federal Court against the COA order. It was only Victor who filed the leave application on his own presumed representative capacity of LBB. In any case, since neither LBB (as a company in itself *via* its Board of Directors) nor any of LBB's creditors have ever filed an application to remove Victor or Gabriel as co-liquidators, then we can only assume that LBB as a company in and of itself was keen to proceed with the liquidation process with the co-liquidators appointed by the COA. Victor's unilateral and disjointed will (independent of Gabriel) cannot at all represent the will of LBB.

[62] Considering the available procedures above, it was glaring to this court that Victor was merely trying to go for a 'shortcut' to enable himself to act as sole liquidator and quickly wrap up the liquidation process by his own unilateral design even before the Federal Court had the opportunity to hear the parties' respective leave applications.

[63] At best, Victor's encl. 48 was merely Victor's 'backdoor' attempt to eschew from the check and balance in which the COA order seeks to strike to ensure a fair and just liquidation of LBB. Even if there was legitimacy in Victor's challenge against the COA order, Victor ought to mount his challenge *vide* the proper channels and procedures. There must be just reasons that the law (as a general rule) insists that co-liquidators must jointly act in unison. Otherwise, (if co-liquidators were clothed with the capacity to

unilaterally represent a company as a defiant sole liquidator to remove one another), then the entire legal mechanism of having joint liquidators shall be doomed to fail as the nature of check and balance in and of itself deals with conflicts and opposing views.

[64] In view of all the aforementioned deliberation, we hereby answer issue 2 in the negative. We are neither keen, nor the law would allow us to extend the post-winding up residuary powers of the Board of Directors to cover even liquidators (so as to allow Victor to unilaterally act on behalf of LBB without referring to the co-liquidator, Gabriel).

Issue 3: Whether This Court Should Grant A Stay As Against The COA Order In The Specific Manner Prayed By Victor

[65] In actuality, issue 3 is already moot, considering we have already found the incompetency of encl. 48 in view of our findings in issues 1 and 2. Nonetheless, the perplexing terms for stay prayed by Victor beckoned us to briefly allude to the confusing and self-contradicting contentions proffered by Victor.

[66] As we have mentioned above, Victor had prayed that the COA order be stayed. But the enigma arising from this prayer was the actual 'extent' or 'mechanism' of stay that Victor had intended to ask from us. To our mind, a stay against the COA order could bear two effects or meaning in that:

(i) Victor asks that the COA order to be stayed specific and limited to the COA's appointment of Gabriel as co-liquidator pending the determination of Victor's leave application before the Federal Court (in which there shall be no preservation of *status quo* as the liquidation process shall proceed with Victor as sole liquidator); or

(ii) Victor asks that the COA order to be stayed in the sense of the entire liquidation process with co-liquidators be stayed pending the determination of Victor's leave application before the Federal Court (in which the current *status quo* of the parties be preserved).

[67] What was significantly beguiling to us was the fact that Victor vacillates in his written submission in contradictorily asking for both (preservation and non-preservation of *status quo*):

(i) within the initial portions of Victor's submission for stay, he argued that the *status quo* of High Court's appointment of Victor as sole liquidator should be preserved as it was the wishes of a majority of LBB's creditors to favour only the appointment of Victor; but

(ii) within the later portions of Victor's submission for stay, he also posited that Gabriel's appointment under the COA order would hinder the supposed last leg of LBB's liquidation process.

[68] The contradiction was glaring merely by a cursory appreciation of Victor's self-contradicting contentions. In one breath, Victor staunchly championed the idea of a stay to preserve the *status quo*, but in the same breath, he also championed the idea for the liquidation to proceed (which effectively squanders the *status quo*).

[69] We certainly do not appreciate Victor's approbating and reprobating of stances in his attempt to sidestep the COA order (and even all of the pending proceedings at the Federal Court) to seize an opportunity to swiftly unilaterally and disjointedly proceed with LBB's liquidation in total disregard of Gabriel and the interest of the appellant. It was clear to us, that it is instead Victor's brand of 'stay' that would lead to the Federal Court decision to be rendered nugatory, as LBB would have already proceeded with the liquidation with a sole liquidator (if in fact the Federal Court dismisses Victor's leave application).

[70] Considering all of the above, we hereby answer issue 3 in the negative. Thus, there is no reason for us to grant a stay of the COA order in terms as prayed for by Victor Saw Seng Kee.

Our Decision

[71] All the aforementioned deliberations considered, we hereby dismiss encl. 48 with costs of RM15,000.

[72] We also accordingly order the costs of RM15,000 be borne personally by Victor Saw Seng Kee and payable to the appellant subject to the allocatur.